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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT SEATTLE

9 GEORGE PRUE,

10 Plaintiff,

11 v.

12 UNIVERSITY OF WASHINGTON, *et*
13 *al.*,

14 Defendants.

Case No. C07-1859RSL

ORDER GRANTING
MOTION TO COMPEL

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16 **I. INTRODUCTION**

17 This matter comes before the Court on defendants' motion to compel plaintiff to
18 identify the medical and mental health providers he has seen for the past ten years, to
19 identify the nature of treatment and approximate dates thereof, and to compel him to sign
20 stipulations to release the records directly from those providers to defendants.
21 Defendants also seek an award of fees and costs for having to bring this motion.

22 For the reasons set forth below, the Court grants the motion to compel.

23 **II. DISCUSSION**

24 Plaintiff, who is African American, alleges that the University of Washington and
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1 two individual defendants discriminated against him based on his race and age when they
2 failed to hire him for an open position in September 2005. Plaintiff seeks emotional
3 distress damages. He contends that he suffers from depression and post traumatic stress
4 disorder (“PTSD”) as a result of defendants’ conduct.

5 Plaintiff has agreed to provide medical records regarding his mental, emotional, or
6 psychological health, and has provided the names of people who have treated him for
7 those issues. He has refused to provide any other information in response to the
8 interrogatory. The parties met and conferred prior to defendants’ filing this motion but
9 were unable to resolve the matter.

10 **A. The Discovery Requests.**

11 Defendants are entitled to information relevant to “any party’s claim or defense”
12 and to broad discovery of information “reasonably calculated to lead to the discovery of
13 admissible evidence.” Fed. R. Civ. P. 26(b)(1). Plaintiff does not argue that he has seen
14 an inordinate number of providers or that it would be otherwise burdensome to respond.
15 Plaintiff concedes that defendants are entitled to information from the past ten years
16 regarding his mental, emotional, or psychological health. He argues that because he is
17 not alleging that defendants caused him any physical harm, any information related to his
18 physical health is privileged and irrelevant. Although plaintiff relies on Washington’s
19 physician-patient privilege, it does not appear to apply in this case.¹ Plaintiff has asserted
20 only federal claims, and the federal law of privilege governs federal question cases. See,
21 e.g., Religious Tech. Ctr. v. Wollersheim, 971 F.2d 364, 367 n.10 (9th Cir. 1992).

23 ¹ Even if the privilege applied, it is likely that plaintiff has waived it. RCW
24 5.60.060(4)(b) (“Waiver of the physician-patient privilege for any one physician or
25 condition constitutes a waiver of the privilege as to all physicians or conditions.”).

1 Although the Supreme Court has recognized a federal psychotherapist-patient privilege, it
2 has not approved of a broader federal privilege. Accordingly, the information is not
3 privileged.

4 To support plaintiff's relevancy argument, he cites two published cases from
5 California courts that have limited the scope of similar discovery requests. Although a
6 defendant would not automatically be entitled to review all of a plaintiff's medical
7 records every time an emotional distress claim is made, three points persuade the Court
8 that broad disclosure is appropriate in this case. First, unlike in one of the cases plaintiff
9 cites, he has alleged damages well beyond "garden variety" emotional distress. See, e.g.,
10 Fitzgerald v. Cassil, 216 F.R.D. 632, 637 (N.D. Cal. 2003) (explaining that courts have
11 found a waiver of the privilege "when the plaintiff has done more than allege 'garden
12 variety' emotional distress"). Second, plaintiff has not been forthcoming in his discovery
13 responses in two areas. Supplemental Declaration of Jayne Freeman (Dkt. #27) at ¶¶ 10,
14 11 (explaining that plaintiff subsequently stated that he had applied for positions with
15 several employers not previously identified, and seen at least one other medical provider
16 since moving to Seattle who he had not previously identified). Regardless of whether the
17 omissions were intentional or the result of memory lapses, they show that defendants may
18 not obtain complete information about plaintiff's emotional distress unless they are able
19 to review the medical records themselves. Third, defendants have engaged a physician to
20 perform an independent medical examination of plaintiff who has opined that he needs to
21 review plaintiff's medical records from the last ten years to complete his evaluation:

22 [V]alid application of diagnostic criteria in the DSM IV requires direct access to
23 collateral information such as medical history. Complete and accurate information
24 regarding medical as well as mental health history can be important in not only
25 determining prior functional abilities or impairments, but also evaluating alternate
causes of symptoms that meet diagnostic criteria of mental disorders, such as
medical conditions, side effects of medication, or substance abuse.

1 Declaration of Dr. John Hamm, (Dkt. #17) at ¶ 9. Dr. Hamm's declaration shows that
2 defendants are not merely conducting a "fishing expedition" as plaintiff alleges. Plaintiff
3 has not offered a competing medical opinion. Accordingly, defendants are entitled to
4 information about plaintiff's medical history beyond his mental health records.

5 The Court considers whether a narrowing of the request would be appropriate.
6 Plaintiff invited defendants to narrow the scope "to inquire about serious health
7 conditions that might have an impact on Mr. Prue's current emotional distress damages."
8 Plaintiff's Opposition at p. 5. However, defendants are not required to rely on plaintiff's
9 determination of what information might be relevant or his determination, in his lay
10 opinion, of what might have caused his symptoms. Rather, defendants are entitled to
11 review the records themselves to evaluate issues of causation, including whether any of
12 plaintiff's other ailments or medications might have caused his symptoms and whether
13 any of the symptoms predated defendants' actions. Similarly, the records could lead to
14 information regarding whether plaintiff has mitigated his damages, by, for example,
15 following up on previous recommendations by health care providers.

16 Plaintiff also offered to narrow the request to records created after plaintiff moved
17 to Washington in May 2005. However, the relevant employment decision was made just
18 a few months later, in September 2005. Defendants are entitled to information prior to
19 that date to evaluate plaintiff's condition before and after the decision.

20 Accordingly, plaintiff shall be required to provide a complete response to the
21 challenged interrogatory. As for the medical records, the Court will not require plaintiff
22 to sign stipulations for their release. Although the collegial practice of doing so is fairly
23 routine in this district, it is not set forth in the Rules. Defendants can seek the records
24 either through requests for production or subpoenas. If defendants choose to issue

1 requests for production, plaintiff must use his best efforts to secure the records. The
2 Court acknowledges that plaintiff's foreign residences and multiple state moves may
3 make it very difficult to obtain all of his medical records even with his best efforts in this
4 area. Plaintiff will not be required to use extraordinary efforts to obtain the records.

5 **B. Fees and Costs.**

6 Defendants request an award of its fees and costs in bringing this motion pursuant
7 to Federal Rule of Civil Procedure 37(a)(4)(A) which permits an award unless the party's
8 failure to disclose was "substantially justified." In this case, plaintiff's opposition to the
9 discovery request was substantially justified. He has a legitimate privacy interest in his
10 medical records. Also, he had a good faith basis to argue that defendants should not be
11 entitled to records other than from his mental health physicians. Accordingly, the Court
12 will not require him to pay defendants' fees and costs.

13 **C. Document Filed Under Seal.**

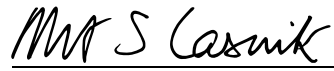
14 Defendants have filed a document under seal without filing a motion to do so as
15 required by Local Rule 5(g). See Declaration of Jayne Freeman, (Dkt. #19), Exhibit C.
16 Because the document contains plaintiff's social security number, the Court will not order
17 it unsealed. Rather, within ten days of the date of this order, defendants must either (1)
18 file a redacted copy of the document in the docket, or (2) file a motion or stipulation and
19 proposed order to maintain the document under seal. If the parties seek to file any
20 additional documents under seal in this case, they must comply with Local Rule 5(g).

21 **III. CONCLUSION**

22 For all of the foregoing reasons, defendants' motion to compel (Dkt. #16) is
23 GRANTED. Plaintiff must provide a complete response to Interrogatory No. 5 within ten
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1 days of the date of this order.

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3 DATED this 19th day of August, 2008.

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7 Robert S. Lasnik
8 United States District Judge
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